Supreme Court, U.S.
FILED
JUL 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-103

In The

Supreme Court of the United States

October Term, 1987

WILLIE BIGFORD, JR.

Petitioner,

vs.

JOE MAX TAYLOR, ET AL.,

Respondents.

RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GALVESTON COUNTY LEGAL DEPT.

SCOTT LYFORD
4127 Shearn Moody Plaza
123 25th Street
Galveston, Texas 77550
(409) 766-2348

Attorney for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT OF CERTIORARI 4

A. THE CONSTITUTIONALITY OF CHAPTER 47 ... 5

No County policy shown by state law 5

There was no decision by a County policy-maker 6

Chapter 47 contains a bonding procedure 6

Bigford did not challenge the constitutionality of Chapter 47 7

B. ALLEGED COUNTY POLICY 7

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Bigford v. Taylor, 834 F.2d 1213 (5th Cir. 1988) .. *passim*

Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S.Ct. 1292 (1986) 5, 6

STATUTES

Chapter 47, Texas Code of Criminal Procedure .. *passim*

Art. 47.04 ..... 2, 6

Art. 47.05 ..... 2, 6

28 U.S.C. 2403(b) 7

No. 88-103

In The

Supreme Court of the United States

October Term, 1987

WILLIE BIGFORD, JR.,

Petitioner,

vs.

JOE MAX TAYLOR, ET AL.,

Respondents.

RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT:

The respondents, Joe Max Taylor et al., respectfully request that this Court deny the petition for writ of certiorari seeking review of the Fifth Circuit's opinion in this case, reported at 834 F.2d 1213 in *Bigford v. Taylor.*

STATUTORY PROVISIONS INVOLVED

Chapter 47 of the Texas Code of Criminal Procedure provides, in pertinent part:

> Art. 47.04 Upon an examining trial, if it is proven to the satisfaction of the magistrate that any person is the true owner of property alleged to have been stolen, and which is in possession of a peace officer, he may upon motion by the state, by written order direct the property to be restored to such owner subject to the conditions that such property shall be made available to the state or by order of any court having jurisdiction over the offense to be used for evidentiary purposes.
>
> Art. 47.05 If the magistrate has any doubt as to the ownership of the property, he may require a bond of the claimant for its redelivery in case it should thereafter be shown not to belong to such claimant . . .

STATEMENT OF THE CASE

Just after dawn on July 13, 1982, in a rural area of Galveston County, Sheriff's deputy Kenneth Spoor observed a pickup truck beside the road (PX #21, p.11). Approaching the vehicle, which appeared to be abandoned, Spoor discovered Willie Bigford, Jr. lying in the cab (*Id.* p.6). Spoor knocked on the window and Bigford got out (*Id.* p.10).

When Bigford opened the door Spoor noticed a required Federal Inspection Safety Sticker (FISS) was missing (*Id.* p.6,12). He notified his supervisor, as he had been trained (*Id.* p.14,17). Sergeant Cook arrived, and from that point on Spoor was "following his orders" (*Id.* p.14,36).

Cook inspected the pickup (*Id.* p.14). He found someone had tampered with the rivets attaching the plate containing the Vehicle Identification Number (VIN) (*Id.*

p.14-15). He tried to locate the VIN numbers on the frame and could not (*Id.*). Spoor meanwhile ran a computer search on the VIN number from the plate, as well as the license plate number, which listed neither as reported stolen (*Id.* p.15,17-18).

Cook called Captain Ray Lease, who was well aware that even if neither the VIN nor the license was stolen, the vehicle to which they were attached could be (Tr. 171-172). Lease ordered the vehicle towed to the North Galveston County Building, where he was (PX #21 p.15-16).

At the North County Building Lease directed further inspection of the vehicle (PX #21 p.19). He concluded the FISS was missing, the rosette rivets holding the VIN plate on the door jamb tampered with, the engine number removed, and he could locate no VIN on the frame (PX #23 p.8-9). The option sheet normally located in the glove box was missing, as was the one normally found under the seat (*Id.* p.11). He ordered the truck seized because in his opinion the truck had definitely been altered (*Id.* p.10), and further investigation was needed to determine if all or part of the truck was stolen (*Id.* p.31). Following the seizure, control of the truck was turned over to a justice of the peace for the precinct within the County where the seizure occurred. Bigford failed to secure an order returning the truck to him for over five months, at which time the storage charges were more than he wanted to pay.

Bigford sued Kenneth Spoor and Art Chapa. Spoor's acts are set out above. Chapa was simply a new deputy riding with Spoor that morning who did nothing but watch the proceedings. Bigford also sued Sgt. Tommy

Hansen and Sheriff Joe Max Taylor. Hansen was the officer assigned to investigate Bigford's truck following its seizure. Taylor is the elected Sheriff of Galveston County, the official entity which Bigford sued.

The Court of Appeals found that Spoor was liable to Bigford for the wrongful seizure of the vehicle, but refused to consider the due process questions raised since none of the defendants could be liable to Bigford for the violations he alleged. No County policy was shown which resulted in a denial of due process, and none of the individual defendants was directly involved in the duties of the justice of the peace to provide Bigford with a hearing or set a bond for the return of his truck.

REASONS FOR DENYING THE WRIT OF CERTIORARI

Bigford advances two arguments in support of his application for a writ of certiorari. First, he argues that the Court of Appeals failed to consider the constitutionality of Chapter 47 of the Texas Code of Criminal Procedure, which establishes one of the State's procedures provided for persons asserting an interest in property which the police have seized.

Second, he suggests that the Court erred in concluding that the evidence did not reveal any County policy which caused the violation of his rights. Neither of these contentions is accurate, and neither provides sufficient grounds for this Court's review of the decision below.

A. THE CONSTITUTIONALITY OF CHAPTER 47

Bigford contends that the decision of the Court of Appeals is in conflict with this Court's decision in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292 (1986). In that case this Court concluded that a single decision by a policymaker could result in liability being imposed upon a County. It relates in no way to the facts of this case.

No County policy shown by state law.

In maintaining that a County policy is established by virtue of the existence of Chapter 47 of the Texas Code of Criminal Procedure, Bigford relies upon a part of Justice O'Conner's concurring opinion in *Pembaur*, wherein it is stated

> Given that this procedure was consistent with federal, state and local law at the time the case arose, it seems fair to infer that respondent county's policy was no different.

The procedure referred to was the unconstitutional entry into the doctor's office, which was explicitly authorized by the County Attorney. The fact that this decision was consistent with then existing state law merely added weight to the argument that the decision was a policy making act, by an officer authorized to make policy. The act of the County Attorney created county policy, not an act of the state.

In contrast, the policy which Bigford complains of is the alleged failure of Chapter 47 to provide a procedure which would have allowed him to obtain his vehicle by posting a bond. Even if the State Legislature had failed to

place a bonding provision in Chapter 47 (and it did not, see *infra*), that failure could not be attributed to County policy.

There was no decision by a County policymaker.

The evidence was of Bigford's dealings with a justice of the peace within one of the County precincts. This justice, the lowest level of magistrate within the County, was not a County policymaker. As the Court of Appeals correctly concluded,

> (h)is "deliberate or mistaken departure from the controlling law" cannot be said to represent county policy.

Bigford v. Taylor, 834 F.2d 1213,1222 (5th Cir. 1988), citing *Pembaur*, 475 U.S. at 486, 106 S.Ct. at 1302. He is simply carrying out the policy of the State of Texas in complying with the statutes in question. Thus even if Bigford were complaining of an act of this judge's failure to comply with state law, that failure cannot be said to represent County policy.

Chapter 47 contains a bonding procedure.

The most confusing part of Bigford's position, and the opinion of the Court of Appeals for that matter, is the suggestion that Chapter 47 does not contain a procedure for posting a bond to obtain property which has been seized. *Bigford*, supra, at 1223. Articles 47.04 and 47.05, quoted above, clearly provide that a magistrate is empowered to deliver property to a claimant conditioned upon the claimant's posting of a bond. Both statutes were

adopted in 1965 and were in effect at the time of Bigford's dealings with Judge Buckner.

Bigford did not challenge the constitutionality of Chapter 47.

Perhaps the rather cursory manner in which the Court of Appeals dealt with the constitutional challenge resulted from the fact that it was an issue created by the Court itself, not by the parties. Bigford did not complain of the constitutionality of Chapter 47 before the trial court at the time of his second trial, nor did he raise such an issue on appeal. On the contrary, the Court construed his suggestion that the officers should have provided him a bonding procedure "as, in substance, a facial attack on the constitutionality of Tex.Code Crim.Proc. arts. 47.01-11;" *Bigford*, supra at 1222.

Thus Bigford did not directly raise a constitutional challenge before either the trial court or the Court of Appeals. His suggestion now that the Court erred in failing to certify the constitutional challenge to the State of Texas pursuant to 28 U.S.C. 2403(b) fails to demonstrate in any way how he has been prejudiced, especially since the basis for the Court of Appeals's "assumption" of unconstitutionality is erroneous.

B. ALLEGED COUNTY POLICY

Bigford argues that "Galveston County had a fixed plan of action to be followed for impounding vehicles on the basis of missing FISS stickers;" *Petition*, at p. 17. That

assertion is totally unsupported, as shown simply by looking at the facts set forth in Bigford's application.

The missing Federal Safety Inspection Sticker (FISS) was what prompted Officer Spoor to call a supervisor, Sgt. Cook. Cook found that the rivets holding the VIN plate on the door frame had been tampered with, and he could not locate the VIN number on the frame. He also thought the truck's body did not appear to match the frame.

At that point Cook had the vehicle towed to the North County Building for further investigation[1], which was, according to the Court of Appeals, all that was authorized; *Bigford*, at 1219. Further inspection revealed that the engine number had been removed and the option sheets normally found in two places were missing. Captain Lease ordered the truck seized because in his opinion it had definitely been altered.

This was the evidence presented by Bigford. It does not even suggest that there is any policy in Galveston County of seizing vehicles solely on the basis of missing FISS stickers. A missing sticker means simply, as Spoor testified, that a knowledgeable supervisor must be called to conduct an investigation.

---

[1] It is revealing to note that Bigford confirms Spoor's contention that this is what happened; *Petition*, at 15. The Court of Appeals concluded that Spoor had the truck towed directly to a storage yard, on his own authority; *Bigford*, supra, at 1216. Bigford obviously agrees with Spoor's contention that he did not authorize the seizure but merely followed his supervisor's directions; see Docket No. 87-1960, Petition for Writ of Certiorari filed in this Court by Kenneth Spoor, petitioner.

There was no evidence presented as to other seizures. The testimony of Hansen that impounded vehicles frequently prove not to be stolen does not, as the Court of Appeals correctly concluded,

> establish that Galveston County officers regularly seize vehicles without probable cause.

Bigford, at 1221. That testimony alone does not establish any policy of Galveston County which resulted in the seizure of Bigford's truck, let alone a policy of seizing vehicles without probable cause.

CONCLUSION

Bigford fails to demonstrate any conflict between the decision of the Court of Appeals and prior decisions of this Court. His complaint as to the constitutionality of Chapter 47 of the Texas Code of Criminal Procedure was not raised at trial nor in the Court of Appeals, and the complaint he now raises does not correctly portray the statute. Finally, his arguments as to County policy are simply not supported by the evidence. There is no reason for this Court to grant certiorari on his complaints.

Bigford does, however, indicate his agreement with the facts outlined in the Petition for Writ of Certiorari filed by Kenneth Spoor in this Court's docketed Cause No. 87-1960, which lends support to Spoor's contention that he is entitled to qualified immunity.

Respectfully submitted,

GALVESTON COUNTY LEGAL DEPT.

BY: SCOTT LYFORD
4127 Shearn Moody Plaza
123 25th Street
Galveston, Texas 77550
(409) 766-2348

Attorney for Respondents